

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

IN RE:

ITT EDUCATIONAL SERVICES, INC.,  
ESI SERVICE CORP., and DANIEL  
WEBSTER COLLEGE, INC.

Debtors.

DEBORAH J. CARUSO, the Chapter 7  
TRUSTEE FOR ITT EDUCATIONAL  
SERVICES, INC., ESI SERVICE CORP.  
and DANIEL WEBSTER COLLEGE, INC.

Plaintiff,

vs.

KEVIN MODANY, JOHN E. DEAN, C.  
DAVID BROWN II, JOANNA T. LAU,  
THOMAS I. MORGAN, JOHN VINCENT  
WEBER, JOHN F. COZZI, SAMUEL L.  
ODLE, and JERRY M. COHEN,

Defendants.

Case No. 16-07207-JMC-7A

Jointly Administered

Adversary No. 1:18-AP-50100-JMC

**FORMER DIRECTORS' MOTION TO DISMISS COMPLAINT**

John E. Dean, C. David Brown II, Joanna T. Lau, Thomas I. Morgan, John Vincent Weber, John F. Cozzi, Samuel L. Odle, and Jerry M. Cohen (collectively, "Former Directors"), by counsel, pursuant to Fed.R.Bankr.P. 7012(b) and Fed.R.Civ.P. 12(b)(6), respectfully move the Court to dismiss Count I of the Complaint filed by the Trustee, and in support thereof, state:

1. The Trustee's Complaint against the Former Directors for breach of fiduciary duty fails to state a plausible claim for relief. The Trustee's claim of inaction by the Former Directors does not surmount the high bar of a *Caremark* claim under Delaware law, especially given the presence of an exculpatory clause that bars a breach of duty of care claim. *In re*

*Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996). Moreover, the Complaint contains numerous allegations showing the Former Directors were engaged, actively managed ITT and sought expert counsel, and supervised ITT's Chief Executive Officer, Kevin Modany – all of which contradict the notion that the Former Directors did nothing while ITT struggled to meet the onerous demands of the Department of Education.

2. The Trustee also fails to state a claim for relief by challenging decisions made by the Board that are subject to the director-friendly business judgment rule. The decision to allow Modany to take the lead on investigating potential transactions, to not terminate Modany, and to pursue a transaction rather than a teach-out model are all the type of board decisions that Delaware courts are loathe to second-guess. *See In re Citigroup*, 964 A.2d 106, 124-26 (Del. Ch. 2009). This is even more true where, as here, an exculpatory clause pursuant to 8 Del. Code Ann. § 102(b)(7) insulates directors from duty of care claims, meaning the Trustee must show the Former Directors were disloyal to ITT or acted in bad faith. The Complaint fails to state a claim given this extremely high standard.

3. The Former Directors have filed a supporting brief contemporaneously herewith that provides further authority for their motion.

WHEREFORE, the Former Directors, by counsel, respectfully request that the Court<sup>1</sup> dismiss the Complaint with prejudice, award the Former Directors costs and attorneys' fees as permitted by law, and for all other just and proper relief.

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<sup>1</sup> The Former Directors filed a motion to withdraw the reference of this matter pursuant to 28 U.S.C. § 157(d) on June 28, 2018 (Dkt. 44), and that motion remains pending with the District Court. The Former Directors do not consent to entry of final orders or judgment by the Bankruptcy Court.

Respectfully submitted,

/s/ Paul D. Vink

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of August, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

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I further certify that on August 24, 2018, a copy of the foregoing was mailed by first-class United States mail, postage prepaid, and properly addressed to the following:

None

/s/ Paul D. Vink  
Paul D. Vink